# Dato' Aishaf Falina bt Ibrahim v Ismail bin Othman & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-352–07 OF 2015
NANTHA BALAN J
2 SEPTEMBER 2016

*Civil Procedure — Striking out — Application to strike out writ and statement of claim — Plaintiff sued defendants for invasion to privacy, misuse of personal information, defamation, misrepresentation and negligence — First defendant filed application to strike out plaintiff's writ and statement of claim — Whether based on pleadings and/or affidavit evidence, plaintiff's claim ought to be struck out summarily without being heard on merits at full trial — Rules of Court 2012 O 18 r 19(1)(a), (b), (c) & (d)*

The plaintiff was a Managing Director of Wisma Denmark Sdn Bhd whereas the first defendant was Commander in the Royal Malaysian Navy. The gravamen of the plaintiff's claim in the main action was that although she had divorced the first defendant, the Royal Malaysian Navy's Human Resource Information System ('the HR system') had continued to portray the plaintiff as still being married to the first defendant. The plaintiff contended that the HR system contained untrue information with regards to her address and her marital status and such information had been published to third parties. The plaintiff thus filed her claims against the defendants based on invasion to privacy, misuse of personal information, defamation, misrepresentation and negligence. In response, the first defendant filed the present application ('encl 16') and sought to strike out the plaintiff's writ and statement of claim pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 and/or under the inherent jurisdiction of the court. The issue arose was whether based on pleadings and/or affidavit evidence, the plaintiff's claim ought to be struck out summarily without being heard on merits at a full trial.

**Held**, dismissing encl 16 with costs of RM3,000 subject to 4% allocatur:

(1) The plaintiff should be allowed to have her day in court so as to allow her to ventilate her several causes of action against the first defendant and the other defendants, no matter how weak those causes of action appeared to be. It was both desirable and imperative that the various legal arguments and formulations were given mature consideration at a full trial. It would be premature to say that the plaintiff had no cause of action at all against the first defendant. That was an open question which could only be determined at full trial. Further, the court found that there were serious issues with regards to the several causes of action that had been pleaded

and there were obvious factual disputes of and concerning the first defendant's role in the alleged 'misuse' of the plaintiff's personal information. As such, this was not a clear and obvious case for striking out (see paras 26–29).

**[Bahasa Malaysia summary**

Plaintif adalah Pengarah Urusan Wisma Denmark Sdn Bhd sementara defendan pertama adalah Komander Tentera Laut Diraja Malaysia. Asas tuntutan plaintif di dalam tindakan utama adalah bahawa walaupun dia telah menceraikan defendan pertama, Sistem Maklumat Sumber Manusia Tentera Laut Diraja Malaysia ('sistem SM') telah berterusan menggambarkan plaintif sebagai masih berkahwin kepada defendan pertama. Plaintif berhujah bahawa sistem SM mengandungi maklumat tidak benar berkenaan alamat dan status perkahwinannya dan maklumat sedemikian telah diterbitkan kepada pihak ketiga. Plaintif oleh itu memfailkan tuntutannya terhadap defendan-defendan berdasarkan pencerobohan terhadap privasi, penyalahgunaan maklumat peribadi, fitnah, misrepresentasi dan kecuaian. Dalam menjawab, defendan pertama memfailkan permohonan ini ('lampiran 16') dan memohon untuk membatalkan writ dan pernyataan plaintif berikutan A 18 k 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012 dan/atau di bawah bidang kuasa inherens mahkamah. Isu berbangkit adalah sama ada berdasarkan pliding dan/atau keterangan afidavit, tuntutan plaintif patut dibatalkan secara terus tanpa didengar atas merit pada perbicaraan penuh.

**Diputuskan,** menolak lampiran 16 dengan kos sebanyak RM3,000 tertakluk kepada 4% alokatur:

(1) Plaintif patut dibenarkan untuk kesnya didengar di mahkamah untuk membenarkannya membincangkan beberapa kausa tindakannya terhadap defendan pertama dan defendan yang lain, tidak kira betapa lemahnya kausa tindakan tersebut. Adalah elok dan imperatif bahawa pelbagai hujahan dan perumusan undang-undang diberikan pertimbangan matang pada perbicaraan penuh. Adalah akan menjadi pra matang untuk menyatakan bahawa plaintif tidak mempunyai kausa tindakan langsung terhadap defendan pertama. Ia adalah soalan terbuka yang hanya boleh ditentukan pada perbicaraan penuh. Selanjutnya, mahkamah mendapati bahawa terdapat isu-isu serius berkaitan beberapa kausa tindakan yang telah diplidkan dan terdapat fakta pertikaian jelas dan berkenaan peranan defendan pertama di dalam 'misuse' yang didakwa terhadap maklumat peribadi plaintif. Dengan itu, ini bukan kes yang jelas dan nyata untuk pembatalan (lihat perenggan 26–29).]

**Notes**

For cases on application to strike out writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9357–9358.

**Cases referred to**

*Applause Store Productions Ltd and another v Raphael* [2008] EWHC 1781, QB (refd)
*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, SC (refd)
*Goh Koon Suan v Heng Gek Kiau & Ors* [1991] 2 MLJ 307, HC (refd)
*Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192, CA (consd)
*Mohamad Izaham bin Mohamed Yatim v Norina bt Zainol Abidin & Ors* [2017] 7 MLJ 772; [2015] 7 CLJ 805, HC (refd)
*Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309, CA (refd)
*Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, SC (refd)
*Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)
*Supuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368, HC (refd)

**Legislation referred to**

Islamic Family Law (Federal Territories) Act 1984
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), O 33 r 3

*Justin Voon (Justin Voon Chooi & Wing) for the plaintiff.*
*Muhammed Nasser bin Yusof (Mohamad Fauzi bin Abd Samad with him) (The Law Chambers of Fauzi & Nasser) for the first defendant.*
*Habibah bt Haron (Senior Federal Counsel, Attorney General's Chambers) for the second and third defendants.*

**Nantha Balan J:**

THE APPLICATION

**[1]** These are my grounds of judgment in respect of an application by the first defendant ('D1') to strike out the writ and statement of claim dated 1 July 2015. The application (encl 16) is made under O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 and/or under the inherent jurisdiction of the court.

INTRODUCTION

**[2]** The plaintiff is a businesswoman and the Managing Director of Wisma Denmark Sdn Bhd. She is the daughter of the late Tan Sri Ibrahim Mohamed who was well known in the Malaysian corporate arena. The plaintiff married D1 on 22 October 2003. D1 is a member of the Royal Malaysian Navy under

the purview of the Government of Malaysia and the Armed Forces Council. He is presently a Commander in the Royal Malaysian Navy. The plaintiff's marriage to D1 did not last. Their marriage was dissolved on 29 April 2010 by way of 'surat akuan cerai' under the Islamic Family Law (Federal Territories) Act 1984. On 21 April 2013, D1 married Sujaihah bt Abd Ghafar ('Puan Sujaihah') whose address is at D25-1, The Saffron at Sentul East, No 1 Jalan Sentul Indah, Kuala Lumpur. This is evidenced by a 'surat perakuan nikah' dated 21 April 2013 (see exh IBO1 annexed to encl 17). All of these details ate seemingly mundane but in the context of the present suit, they are significant as they form the factual basis of the plaintiff's claim. I turn now to the plaintiff's claim.

THE PROBLEM

**[3]** The gravamen of the plaintiff's claim in the present action is that although she divorced D1, the Royal Malaysian Navy's Human Resource Information System or 'Sistem Maklumat Sumber Manusia' ('the HR system') has continued to portray, inter alia, the plaintiff as still being married to D1.

**[4]** The plaintiff's specific complaint is that the HR system (until it was recently rectified — after this suit was filed), showed that the plaintiff is still married to D1 and has an address at D25-1, The Saffron at Sentul East, No 1 Jalan Sentul Indah, Kuala Lumpur. Quite obviously both these facts are untrue. Apart from the name and address of D1's spouse, the photograph of D1's spouse is also shown in the HR system. In this regard, to add insult to injury, the photograph of D1's wife as depicted in the HR system was that of Puan Sujaihah (see exh 4 annexed to encl 5), whilst the name of the spouse is that of the plaintiff. As such, the plaintiff is livid that the HR System contains such untrue information with regards to her address and her marital status vis a vis D1. According to the plaintiff's pleaded case, the false and/or untrue information in the HR system has been published to third parties.

**[5]** As such, the plaintiff claims that she has been defamed and/or put to mental stress and anxiety. Her claim against the defendants is based on:

(a) invasion of privacy;

(b) misuse of personal information;

(c) defamation;

(d) misrepresentation; and

(e) further and/or in the alternative, negligence.

A THE PLAINTIFF'S CLAIM (PER STATEMENT OF CLAIM)

**[6]** I turn now to the plaintiff's claim which is targetted against D1. The starting point in her claim against D1 may be gleaned from the following paragraphs in the statement of claim:

B

> 7. Therefore, the Plaintiff is claiming that *the 1st Defendant and 3rd Defendant inter alia wrongfully misused her name, identity and her personal information, invasion of privacy and dignity and her personal information, passing off the Plaintiff's name and identity and giving false representation to the public/third parties.*
>
> C 8. Further, the Plaintiff is claiming that the *Defendants were negligent in using the name, identity and information of the Plaintiff wrongfully because the Defendants failed to update the information in the said Information System and also defamed the Plaintiff.*
>
> 9. The 2nd, Defendant and/or 3rd Defendant are also responsible and jointly
> D responsible with the abovementioned 1st Defendant as principal and/or under 'vicarious liability' for the conducts of the 1st Defendant. (Emphasis added.)

**[7]** The plaintiff also made the following averments in the statement of claim in relation to D1's alleged role in respect of the false and/or untrue
E information in the HR system. I now refer to the in following paras in the statement of claim,

> 13. The Plaintiff states that *her name has been misused* as follows via the search in the Human Resource Information System of the Royal Malaysian Navy (hereinafter
> F referred as 'the said Information System') on the 1st Defendant's name and/or the 1st Defendant's particulars on April, 2015 which can be searched by inter alia any party and/or anyone in the Royal Malaysian Navy:

| | |
|---|---|
| Keluarga | |
| Status/Tarikh Perkahwinan | *KAHWIN (Tarikh: 21/04/2013)* |
| G Name Isteri/Suami | *AISHAF FALINA BT IBRAHIM* (PERKAHWINAN KEDUA) |
| Pekerjaan Isteri/Suami | *PENGARAH URUSAN WISMA DENMARK* |
| H Alamat Isteri/Suami | *NO E2D-18-3, THE SAFFRON NO 1, JALAN SENTUL INDAH EAST, 51100 KUALA LUMPUR* |
| Jumlah Anak | 1 ORANG |
| I No Tel | 012-5553448 |
| Email | ismail.othman@navy.mil.my |

> 14. *The Plaintiff believes and states that the 1st Defendant had inter alia used the name and the private information of the Plaintiff and the Plaintiff's good name and reputation and for his own benefit* in the Royal Malaysia Navy, including for the

purpose of promotion and to obtain a good name.

15. The Plaintiff had also obtained information that the 1st Defendant at all material times informed third parties that he is the son in law of Tan Sri Ibrahim Mohamed and the Plaintiff's name is the name of his wife.

16. Based on the said Information System at paragraph 13 above, inter-alia:

(i) The Plaintiff purportedly is alleged to be the current wife of the 1st Defendant which is a false and/or untrue information;

(ii) The Plaintiff purportedly is alleged to be married to the 1st Defendant on 21/4/2013 which is a false and/or untrue information;

(iii) The 1st Defendant was stated to be currently in the 'second marriage' with the Plaintiff, which is believed to be a false and/or untrue information;

(iv) The 1st Defendant purportedly is married with someone holding the position of Managing Director of Wisma Denmark which is also a false and/or untrue information;

(v) That the Plaintiff purportedly has a joint address with the 1st Defendant currently at 'No E2D-18-3, The Saffron, No 1, Jalan Sentul Indah East, 51100 Kuala Lumpur' (hereinafter referred to as 'the said Saffron Address') which is also a false and/or untrue information; and

(vi) That purportedly and give the impression that the Plaintiff is currently staying with the 1st Defendant as 'husband and wife' at the said Saffron address which is also a false and/or untrue information/impression.

17. *The Plaintiff states that the said information and the said false and/or untrue impression were entered in bad faith by the 1st Defendant for his own benefit* and the Plaintiff's personal information and/or the abovementioned impression were, inter alia, wrongly represented by the Defendants as explained on the above.

18. Therefore, the Plaintiff states that *the 1st Defendant* and/or the 3rd Defendant (who is responsible for the administration of the Royal Malaysian Navy) have inter-alia:

(i) *Wrongfully use the name, identity and personal information* of the Plaintiff;

(ii) *Invaded the Plaintiff's privacy and dignity and her personal information;*

(iii) *Misuse the Plaintiff's personal information;*

(iv) *Gave a false and/or untrue representation by misusing the name, identity and personal information of the Plaintiff;*

(v) Unfairly treated the Plaintiff by using the name, identity and personal information of the Plaintiff, without her knowledge and/or her approval;

(vi) Passed off the Plaintiff's name and identity as the name and identity of the 1st Defendant's wife; and

(vii) Furnished false and/or untrue information and/or impression to third parties.

19. The Plaintiff states that it is *impossible for the false and/or untrue information to*

*be recorded in the said Information System, unless the information was allowed by the 1st Defendant and/or agreed and furnished by him.*

20. Moreover, the Plaintiff learns that the lst Defendant is the Chief Secretary of the Media Management and/or the Director of the TLDM Media Management in the Royal Malaysian Navy. (Emphasis added.)

THE SUBMISSIONS

**[8]** Counsel for D1 argued that D1 had no role in relation to what goes into the HR system and that the suit as against D1 should be struck off as D2 and D3 have acknowledged that there was a glitch in the HR system. According to D1, he is exonerated. D1 also maintains that he derived no benefit from using the plaintiff's name in the HR system.

**[9]** Further, he maintains that he is only in charge of media matters and has no jurisdiction over matters pertaining to the records of the Royal Malaysian Navy. Counsel said that the cause of action that the plaintiff is relying on (invasion of privacy) is not actionable in Malaysia as it has not been recognised as a tort. It was also suggested that the plaintiff has no evidence to link D1 to the impugned information in the HR system.

**[10]** On the other hand, it was argued for the plaintiff that based on the pleadings, this is a plainly unsuitable case for any striking out, particularly when there are clear triable issues and/or facts which ought to be ventilated in a full trial. Counsel for the plaintiff said that while D1 attempts to deny any involvement in relation to the facts of this case, there are various disputed facts which ought to be ventilated in a full trial via viva voce evidence. According to the plaintiff, D1 cannot credibly deny the following matters, which at any rate warrant a full trial:

(a) D1 is the only party who can supply the necessary personal information for the HR system since he is the navy officer who could supply his personal biodata and/or details including details of his wife/ex-wife for entry into the HR system;

(b) D1 holds a high position in the Royal Malaysian Navy where he is pleaded as the 'Ketua Sektetariat Pengurusan Media dan/atau Pengarah Pengurusan Media TLDM'. In this regard, counsel referred to the averment in para 20 of the statement of claim which was apparently brushed off and/or avoided in para 18 of D1's defence as being 'irrelevant';

(c) reference was made to para 5 of defence of the second and third defendant where it was pleaded that D1 did hold the position of 'Ketua Sekretariat Pengurusan Media TLDM' which is a very high position and/or in a position of power in relation to the HR system;

(d) counsel also submitted that it is unbelievable and/or unusual that such basic personal particulars of the plaintiff can be in the domain of the HR system which is accessible by all the members of the Royal Malaysia Navy from about 2010 and 2013 until about the time this suit was filed in 2015 ie for such a long time without any remedial action by the defendants, particularly D1 himself. Counsel emphasised that D1 would be aware of it and would not have allowed such 'wrong' and/or 'untrue' particulars to reflect about himself and ought to have removed it much earlier, unless of course he wanted these 'wrong' particulars to remain in the HR system;

(e) the plaintiff has further pleaded that D1 is prone to informing third parties that he is the son-in-law of the late Tan Sri Ibrahim Mohamed (plaintiff's father) and/or prone to using the plaintiff's name (see para 15 of the statement of claim); and

(f) if indeed D1 is innocent, he ought to have promptly replied to the letters of demand dated 20 May 2015 and 16 June 2015 found in exhs '5' and '6' of the plaintiff's first affidavit (encl 5).

**[11]** According to counsel for the plaintiff, apart from the aforesaid serious issues which ought to be tried in a full trial, the documents exhibited in exhs 'IBO1', 'IBO2' and 'IBO3' annexed to encl 17, are vague and/or insufficient to absolve D1 from any involvement and/or liability in this matter.

**[12]** Elaborating further, counsel submitted that the 'Perintah Bahagian Dua Angkatan Tetap Pegawai' found in exh 'IBO1' is putportedly dated '10 Ogos 10' (where the date and the year are vague) and it is not explained why the purported personal information of the divorce between the plaintiff and D1 was not reflected in the HR system.

**[13]** Further, it was submitted that the HR system purportedly dated '31 July 2015' found in exh 'IBO1' with updated particulars is 'after the fact' and after this suit was filed on 1 July 2015. Also, the document which was proffered by D1 makes no difference because pursuant to exh '4' of the plaintiff's first affidavit (encl 5), the HR system as at 4 May 2015, shows that her particulars were still wrongly used.

**[14]** Elaborating further, it was submitted by counsel that even if D1's explanation that since 2010 he has updated his marriage particulars are true, this would mean that for a long time from about 2010 until about the time this suit was flled, the plaintiff's name and personal particulars were still in HR system. The wedding photograph in exh 'IBO3' raises more questions, particularly where the photograph in HR system in exh '4' of the plaintiff's flrst affidavit (encl 5) is the photograph of D1's current wife (Puan Sujaihah), but

the name set out remains as the plaintiff's name. In so far as the causes of action relied on by the plaintiff against the defendants are concerned, it was submitted that they include, inter alia:

(a) invasion of privacy;

(b) misuse of personal information;

(c) defamation;

(d) misrepresentation; and

(e) further and/or in the alternative, negligence.

**[15]** Hence, counsel for the plaintiff submitted that even if the tort of invasion of privacy is not sustainable, the plaintiff has other plausible causes of action against D1. With the above factual narrative and legal arguments in mind, I turn now to consider the law on striking out.

STRIKING OUT — THE LAW

**[16]** The most appropriate starting point is the seminal case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 where the Supreme Court enunciated at pp 43–44 as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7*, and this summary procedure can only be adopted when it can be clearly seen that a claim ot' answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co 8*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors 9*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is *in pari materia* with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

**[17]** The next case that should be considered is the case of *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192 at pp 193 and 200, where the Court of Appeal held that in the context of O 18 r 19(1)(b):

> the word 'scandalous' means wholly unnecessary and irrelevant, and not just unpleasant allegations. A pleading is 'frivolous or vexatious' when it is obviously unsustainable.

**[18]** The definition of the word 'vexatious' within the context of O 18 r 19(b) is well illustrated in the case of *Goh Koon Suan v Heng Gek Kiau & Ors* [1991] 2 MLJ 307 at p 308. In this case the court stated that:

> an action is 'vexatious' if the party bringing it is not acting bona fide and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result.

**[19]** At p 200 of *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192 (CA) the Court of Appeal explained 'abuse of the process of the court' as follows:

> An 'abuse of the process of the court' arises under O 18 r 19(1)(d) where the process of the court has not been used in a bona fide manner and the process has been abused.

**[20]** It is frequently argued that a striking out should not be allowed where the facts are disputed. Thus it is tempting to take the view that since parties ate alleging that there are disputes as to fact, the striking out should not be allowed. However, in *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309 the Court of Appeal enunciated the principle even in the presence of disputes of fact in that case, the court may still exercise its unfettered discretion to strike out the action when it is found that the disputed fact is inconsistent with the undisputed and contemporary documents. The following passage in the judgment is relevant:

> The discretionary power to dismiss an action summarily under O 18 r 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim (see *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1). Whether a case is plain or obvious does not depend upon the length oftime it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success (see *McKay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890).
>
> (See: p 320 of the judgment.)

**[21]** The principle that the court should critically examine the allegations that are raised is found in the following passage at p 321 of the judgment:

> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. Where the affidavit evidence discloses a dispute of facts, such facts must be analysed, and if they are found to be inconsistent with the undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence (see p 321

B); *Bank Negara Malaysia v Mohd Ismail & Ors* [1992]1 MLJ 400 followed.

**[22]** In *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 the court opined that the court should not meekly accept that there are disputed facts and the court should take the optimal evaluation of affidavits approach. In this context it is also relevant to have regard to the following salutary guidance given by the learned authors of *Halsbury's Laws of Malaysia* (Vol 1, 2002 Reissue) at para [10.6069] where the principles concerning the court's summary powers to strike out a claim are set out as follows:

> ... These powers are both salutary and necessary not only to enforce the basic rules of pleadings but also to dispose of proceedings which are hopeless, baseless or without foundation in law or in equity or are otherwise an abuse of the process of the court. The powers are exercised by the court by summary process, speedily and generally at an early stage of the proceedings, and they operate as a powerful, effective method of disposing of proceedings without a plenary trial.

**[23]** The next principle that must be borne in mind is that the court also has the inherent jurisdiction to strike out a claim on the basis that it cannot possibly be maintained in law and to allow it to proceed would be vexatious and a waste of time and money: *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC).

**[24]** More recently, the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1 (FC) per Ramly Ali FCJ restated the principles as follows:

> [24] The appeal before us relates to an application to strike out pleading summarily under O 18 r 19 of the ROC on the ground that paras 22–29 of the respondents' statement of claim are scandalous, frivolous vexatious, or is an abuse of the process of the court.
>
> [25] The principles for striking out pleadings pursuant to O 18 r 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summmy process under this rule; and this summary process can only be adopted when it can clearly be seen that a clain1 on the face of it is obviously unsustainable (see *Bandar Builder, Hubbuck & Sons Ltd v Wilkinson, Heywood & Clard Ltd* [1899] 1 QB 86; *Attorney General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274).
>
> [26] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows:
>
> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '*obviously unsustainable*' (Emphasis added.);

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[27] The Court of Appeal, in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75, had adopted the well-settled principle of striking out in the following passage:

> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305 (FC)).

[28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie, the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

[29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at p 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> *It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts* on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

This passage was cited with approval by the Privy Council in a Malaysian case of *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18. (Emphasis added.)

## ANALYSIS

**[25]** Having duly considered the rival arguments of the parties on the facts and law and having read the pleadings and the affidavits, it is my view that there is a possibility that ultimately, there could be an innocuous or non, sinister

explanation for the alleged false and/or untrue information which until recently, appeared in the HR system depicting the plaintiff as D1's wife, albeit that they had divorced on 29 April 2010. I would go so far as to say that at this stage the plaintiff's claim may well be weak or resting on shaky grounds vis a vis all the defendants. But the question is whether at this stage, based on pleadings and/or affidavit evidence, the plaintiff's claim ought to be struck out summarily without being heard on merits at a full trial.

**[26]** From the pleadings and affidavits, it is obvious that the plaintiff considers D1 to be the 'villain in the piece' and responsible for inserting or keeping the false and/or untrue information of and concerning the plaintiff in the HR system. To that extent the plaintiff had pleaded that there has been 'misuse' of the plaintiff's personal information, *to wit*, her marital status and residential address. Whilst I aknowledge that there is some force in the argument put forward by counsel for D1 that the tort of invasion of privacy has not yet gained traction in Malaysian jurisprudence (see *Mohamad Izaham bin Mohamed Yatim v Norina bt Zainol Abidin & Ors* [2017] 7 MLJ 772; [2015] 7 CLJ 805 (HC)), I am also mindful that there are other causes of action, which may well succeed and which at the very least, warrant a full hearing, In particular, it is my view that I should leave room for the possibility that the tort of 'misuse of private information' may well be a plausible cause of action, assuming 'misuse' is proven at trial (see *Applause Store Productions Ltd and another v Raphael* [2008] EWHC 1781 (QB)).

**[27]** Therefore, in my view, the plaintiff should be allowed to have her day in court so as to allow her to ventilate her several causes of action against D1 and the other defendants, no matter how weak these causes of action appear to be presendy. It is both desirable and imperative that the various legal arguments and formulations are given mature consideration at a full trial.

**[28]** I reiterate that at this stage, it would be premature to say that the plaintiff has no cause of action at all against D1. That is an open question which can only be determined at full trial. As for D1's complaint that the plaintiff has no evidence to back up her allegations that D1 was responsible for the entry of the false/untrue information in the HR system, my view is that that is a question to be determined at trial after all the forensic evidence has been placed before the court.

**[29]** Thus, having taken into consideration the several factual averments made by the plaintiff as per the statement of claim and the averments in the affidavits filed by D1 (encl 17) and the plaintiff's first affidavit (encl 5) and paras 12 and 15 of the plaintiff's affidavit in reply (encl 22), I find that there are serious issues with regards to the several causes of action that have been pleaded and there are obvious factual disputes of and concerning D1's role in this

alleged episode concerning, inter alia, the alleged 'misuse' of the plaintiff's personal information. As such, it is my view that this is not a clear and obvious case for striking out. Hence, encl 16 is dismissed with costs of RM3,000 (subject to 4% allocatur) to be paid by D1 to the plaintiff.

Order accordingly.

*Enclosure 16 dismissed with costs of RM3,000 subject to 4% allocatur.*

Reported by Dzulqarnain Ab Fatar